

Notes from Goodwin Procter LLP's Closing Argument Training

Joseph F. Savage Jr.

Calling closing argument “Summation” misses the fun part; it really is an “argument.” Judge Young, D.MA. echoes many when he instructs the jury that closing is a “lawyer’s highest calling.” Probably not the most important part of trial though; indeed all jury research is to the contrary and reflects that jurors’ minds are overwhelmingly made up by then. Hopefully you have already given your best “argument” in the opening “statement.” But closing is not meaningless. I believe closing argument has some value; “it can heal the sick, but it cannot raise the dead.”

The starting point for developing every closing is remembering that every case is “your” case and every fact is “your” fact. It is just one trial – not a plaintiff trial or a defendant trial - you need to own it.

You need to describe it in plain language. (Think Hemingway, not James Joyce.) You need to be able to directly state the issue in 1-2 sentences. (Put it on a 3x5 card and focus on arguing your strengths, not the other guy’s weaknesses.)

What a well done closing does

Reminds

Reinforces

Demonstrates flaws (Do it through your strengths. Avoid being mired in details of their case, their theory. You don’t buy their story – you’ve got the truth.)

Recasts facts in terms of results (using the law as foundation)

Arms your friends on the jury with the ammunition and resolve to fight for your side

Persuades your enemies (Research suggests this is pretty unlikely and is not my focus.)

What to Avoid in a Closing

A well done closing (and trial) should avoid at all costs giving jurors an actual reason to be against you -

Personality

Faux pas

Bad arguments

Corollary: Don't make it hard for jurors to be with you – be personable, honorable, connected with people.

Structure of Closing

Intro: Grab attention – “dark and stormy night,” little bit of emotion

(Many folks go into a thanking, transition mode – not my preferred style. Many people disagree with me.)

Body: What happened and why you win

Dispose of opposition here

Conclusion: Something that makes it meaningful, something that makes it non-routine to find against your client

There is no one formula for the content of these pieces. It is always driven by the trial. It is not likely that chronological is the most persuasive. Maybe a fast, 30,000 foot, view of the chronology can help but a better structuring is to parallel the closing to the opening. A nice goal is to echo what the jury has heard in the way they heard it.

Even though there is no formula you should always prepare your closing ahead of time – then discard it, rewrite it, modify it. Focus on making your opening good and your order of witnesses persuasive and then modify your closing – before and during the trial to reflect what is happening.

Techniques

1. Body Language

Some folks try not to use a podium. (This is a cousin of the “no notes” school of thought. If you can do it, and the judge allows it, fine – if not, not end of world. Likewise, use notes if you can’t memorize without it showing or if you can’t memorize well enough period.) It is important to be talking, not lecturing or reading a speech. Try to say “what ‘we’ have learned” and “what ‘we’ know.” Be sincere (false folksy is no good). Make eye contact. Be physically involved (handle and display the exhibits – move around a little if the judge permits).

2. Rhetorical questions

Two approaches:

Do you just ask the rhetorical question?

Do you ask it and then answer it?

Best to ask rhetorical questions that highlight what you know is on jurors' minds and, hopefully, the other side cannot answer.

3. The Concession

"I know the case not as strong on Count 1 as the other Counts..."

"I know you think \$250,000 is a lot of money, but..."

Some recommend it to enhance your credibility. I'm not a big fan because it runs contrary to the theory of arming your friends in jury room with every weapon. Let them make the concession if they need to.

4. A Little Drama

Closing should feel like storytelling grounded in common sense and experience. So, use the present tense for description of past events. Vary your tone, volume, pace.

5. Concise and short

These are not Elizabethan times when church went all day and folks were used to hours of oratory. Think MTV, IM, Tweets, Facebook posts.

6. Use a lot of facts (or things that feel like facts)

(a) Point to and talk about exhibits

- (1) Visual learners on jury
 - (2) Changes the pacing of the presentation
 - (3) Ties you physically to facts
- (b) Quote from transcripts

Sends the message: “this not me, don’t need to rely on me, it is here in the transcript.”

- (c) Quote the instructions

Weave in the instructions that you are sure to get; it aligns your case with the judge.

Some of the typical instructions to refer to and quote:

- (1) Credibility

Motive, Bias, Impairment, Consistency. Have a favorite story or analogy. For example Edward Bennett Williams would discount the prosecutions’ view by saying “when you look out a dirty window the whole world looks dirty.” Lincoln would tell the jury that “just because the other side keeps saying the dog’s tail is a leg does not make it a 5 legged dog,” etc., etc.

- (2) Common sense

Examples of what makes sense.

- (3) No sympathy

“We don’t want sympathy, family and friends can give us that, we want what’s justly ours = \$\$\$”

(4) Burden of proof

Remind jury their job is about deciding what got proven in the court room and that the burden of proof, especially in a criminal case, is there for the jurors, not just the defendant, because applying the burden protects the jurors from having to decide any close cases – nobody should have to take away somebody’s liberty in a close case.

(5) Damages

You are not responsible for what happened here

(6) Circumstantial evidence (my favorite is not the usual “umbrella in the middle of the day means rain,” I prefer, “if you see a turtle on top of a fence post, that is circumstantial evidence that someone put it there.”)

Bad Closing Statement/Summation Behavior – Things You Must Not Do

Bad behavior is worth studying – it is prohibited because it is thought to work and could influence a jury. If the bad conduct works, let’s study it to find a permissible way to accomplish the same thing. The common theme of most misconduct in closing is a statement that shifts juror focus from the facts and law to emotion. Since emotion clearly matters, and jurors react emotionally, you need to align your facts and your argument with the emotions of the jurors.

Examples of improper conduct, things you must not do:

1. Appeal to juror self-interest (your insurance rates will go up/down)

2. Sympathy
3. Golden rule (“put yourselves in Plaintiff’s shoes”)
4. Race, religion, prejudice
5. Missing witnesses (Court rules vary)
6. Personal opinion (“I believe” – certain testimony, results, etc., “I believe you will find...”)

(Note: I don’t like the frequent repetition of the permissible: “I submit the evidence will show...” Just say: “The evidence will show.”)

7. Inflaming Passions
8. Facts Not in Evidence
9. Using the “L” word – liar

Probably not in your interest anyway, try:

“Economical with truth”

“Devotion to truth less than absolute”

“Not straight forward with you”

10. Sacred oath before God
11. Vouching for witness

12. “Send a message” in a criminal case

13. Attack other counsel

Some Final Recurring Closing Argument Issues

1. To thank or not to thank the jury. (I don’t do it. I think it is a waste of time. Judge usually does it.)

2. “Promises kept” approach. (We promised and delivered, the other side promised and failed.)

3. Analogies (careful, it can make you vulnerable to other analogies).

4. Use all time given? (Don’t if you can use less.)

5. Rehearse/write out/practice. (Absolutely essential.)

6. Answer the opposition. (Only if blockbuster.)

7. Use notes?

Many treatises say never use notes. I disagree. I use a modified “notes for dummies” approach. I deliver the start of the closing without notes – I stand next to the podium for 90 seconds or so and speak without notes and I also try to end my closing without notes – 60 – 90 seconds. In between I walk to exhibits and refer to demonstratives (a chronology for example). The exhibits and demonstratives act as notes for me. Otherwise, I am back to the podium with my outline. I write a full closing before giving it and read it to see that it sounds ok. It is something to rehearse repeatedly. I then make that into an outline and use the outline to

deliver the actual closing. So I always outline the middle part of the closing after having written it all out and I have read my full written version out loud repeatedly to polish it.